

# Introduction

*Trevor Burrus\**

This is the 18th volume of the *Cato Supreme Court Review*, the nation's first in-depth critique of the Supreme Court term just ended, plus a look at the term ahead. After 11 years of helming the ship as editor-in-chief, Ilya Shapiro has become the director of the Robert A. Levy Center for Constitutional Studies and publisher of the *Review*. Stewardship of the *Review* has been passed to me. I'm honored to be the fourth editor-in-chief, joining the estimable lineage of James L. Swanson, Mark Moller, and Ilya. From my summer internship in 2010 to now, I have worked on nine volumes of the *Review*, and I've always been proud of the quality of the product and the speed with which we put it together.

We release the *Review* every year in conjunction with our annual Constitution Day symposium, less than three months after the previous term ends and two weeks before the next term begins. It would be hard to produce a law journal faster. Given that the Court likes to hold big decisions until the end of June, authors often have little more than a month to produce their articles. Then, after a furious editing process—the editor of the *Review* is one of the only people in D.C. who can't leave town in August—we have the finished product in hand by mid-September. We're also proud that this isn't a typical law review, filled with long, esoteric articles on, say, the influence of Immanuel Kant on evidentiary approaches in

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18th-century Bulgaria.<sup>1</sup> Instead, this is a book of essays on law intended for everyone from lawyers and judges to educated laymen and interested citizens.

And we're happy to confess our bias: It's the same bias that infected Thomas Jefferson when he drafted the Declaration of Independence and James Madison as he contemplated a new plan for the government of the United States. Individual liberty is protected and secured by a government of delegated, enumerated, separated, and thus limited powers. Through the ratification process, the People created a federal government bound by the strictures of the Constitution.

The delicate balance of powers within the government is partially maintained by a judiciary that enforces the Constitution according to its original public meaning, which sometimes means going against the "will of the people" and striking down popularly enacted legislation. The Constitution is not an authorization for "good ideas." Everyone who cares about the Constitution should be able to think of something that they believe is a good idea but is unconstitutional, as well as something that is a bad idea but is constitutionally authorized. If you can't think of one, then you don't really believe in the Constitution, you just believe your good ideas. That's fine if you're a member of Congress (although they also take an oath to support and defend the Constitution), but judges and justices are obligated to think beyond their preferences and to enforce the law.

That fact is increasingly forgotten in modern times, as our Supreme Court confirmations look more and more like episodes of "Survivor." Nominees are asked to weigh in on substantive issues, or are queried about something vaguer, such as "will you promise to

<sup>1</sup> Chief Justice John Roberts once opined on the uselessness of law reviews: "Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar." Remarks at the Annual Fourth Circuit Court of Appeals Judicial Conference 28:45–32:05 (June 25, 2011), <https://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts>. See also Orin S. Kerr, *The Influence of Immanuel Kant on Evidentiary Approaches in Eighteenth-Century Bulgaria*, 18 *Green Bag* 2d 251, 251 (2015) ("Chief Justice Roberts has drawn attention to the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria. No scholarship has analyzed Kant's influence in that context. This Article fills the gap in the literature by exploring Kant's influence on evidentiary approaches in 18th-century Bulgaria. It concludes that Kant's influence, in all likelihood, was none.").

fight for the interests of the working class?” Such questions are not only insulting to nominees, but give the American public an image of the Court as nothing more than a super-legislature. Guaranteeing to fight for the working class is the pledge of a politician, not a judge.

At the beginning of this past term, we witnessed a bruising confirmation fight over the seat of Anthony Kennedy, who announced his retirement in June 2018. As the former “swing” justice, and every Democrat’s favorite Republican appointee, the fight over Kennedy’s seat was destined to be a difficult one. But the presidency of Donald Trump has increased animosity in Washington, and the confirmation of Brett Kavanaugh established a new baseline for vicious partisan fights over the Supreme Court. I fear, however, that it will only get worse. It’s somewhat fitting that the fight over the Kennedy seat created a new nadir in confirmation battles. President Ronald Reagan’s first choice to fill the seat of Justice Lewis Powell was Robert Bork, whose nomination was defeated in the first chapter of our modern partisan confirmation battles. Next came Douglas Ginsburg, who withdrew his name from consideration after it was revealed that he used marijuana as an assistant professor at Harvard. Kennedy was the third choice.

Because of the delay created by late-breaking sexual-assault allegations, Justice Kavanaugh missed the first few days of the term and was sworn in on October 6, 2018. That early absence likely proved consequential in at least one case, *Gundy v. United States*, where Kavanaugh might have been the fifth vote to revive the long dormant nondelégation doctrine. You can read more about that fascinating case in Professor Gary Lawson’s excellent contribution to this volume.

In his first term, Justice Kavanaugh has largely done what he said he would do: judge narrowly and conservatively with faithfulness to the Constitution and the rule of law. As predicted, at least by those who have a deeper understanding of jurisprudence than merely looking to the party of the nominating president, Kavanaugh has generally shown himself to be more in the John Roberts/Samuel Alito camp than the Clarence Thomas/Neil Gorsuch one. In fact, Kavanaugh agreed 70 percent of the time with Justices Stephen Breyer and Elena Kagan, which is as much as he did with Justice Gorsuch. As Ilya notes in his foreword, that’s the lowest level of agreement by two justices appointed by the same president since at least John F. Kennedy’s presidency.

More generally, this term confounded those who believe that all the Court does is decide cases 5-4 along partisan lines. There were 20 5-4 decisions (out of 66 total rulings after argument), but only seven featured the Republican appointees vs. the Democrat appointees. When it came to 5-4 decisions, Gorsuch was in the majority in 14 of the 20 (70 percent), Kavanaugh in 12 of 18 (67 percent), and Thomas in 13 of 20 (65 percent). Still, only 39 percent of decisions were unanimous, which is the same as last term and tied for the lowest rate of unanimous decisions since October Term 2008. There are deep ideological divisions in this Court, but those divisions are as much within partisan “blocs” as they are between them.

Justice Kavanaugh, possibly keeping his head down after his raucous confirmation, was the most agreeable justice, voting 91 percent of the time with the majority (85 percent of the time in divided decisions). Next was Chief Justice John Roberts, 85 percent of the time (75 percent in divided decisions), followed by Alito and Kagan at 82 percent (70 percent in divided decisions). No other justice was above 80 percent, with Justices Thomas, Ruth Bader Ginsburg, Sonia Sotomayor, and Gorsuch all at 70 percent (59 percent in divided decisions).

Unsurprisingly, Chief Justice Roberts and Justice Kavanaugh agreed most often, 94 percent of the time, followed by Ginsburg and Sotomayor, 93 percent, and Alito and Kavanaugh, 91 percent. And although Gorsuch and Thomas agreed 100 percent of the time last term, this term saw some new divisions emerge. Who agreed least? As usual, Justice Thomas’s adherence to originalism—which sometimes went too far for even Justice Antonin Scalia—creates divisions with many of the Democrat-appointed justices. Thomas agreed with Justices Ginsburg and Sotomayor only 50 percent of the time, Breyer 51 percent, and Kagan 60 percent. That may seem low, but it’s worth remembering when the Supreme Court is attacked as a purely partisan institution: Ginsburg and Thomas agree half the time.

In his second term, Justice Gorsuch continues to be principled and iconoclastic. He has taken up the late Justice Scalia’s role of often crossing the partisan divide in criminal-justice cases. He also continues to demonstrate that he has no qualms about rocking the boat by writing learned and persuasive opinions that often call into question well-established doctrines. We’re no strangers to this at Cato,

where we often file amicus briefs that ask the Court to reconsider entrenched precedents, as a principled commitment to the Constitution will sometimes require.

In the 2017–2018 term, in *Carpenter v. United States*, Gorsuch wrote a lengthy dissent that called into question the bedrock case in Fourth Amendment jurisprudence, *Katz v. United States*, and asked whether a property-rights-centered view of the Fourth Amendment would be both more faithful to the Constitution and possibly better protective of privacy.<sup>2</sup> This term, Gorsuch and Justice Ginsburg were the lone dissenters from the majority decision in *Gamble v. United States*, which preserved the dual sovereignty exception to the Double Jeopardy Clause. Then, in *Kisor v. Wilkie*, Gorsuch chided the Court for not having the gumption to fully overrule *Auer v. Robbins*, which established the doctrine of judges deferring to an agency’s interpretation of its own regulations. Perhaps most surprisingly, he crafted a spirited dissent in *Gundy v. United States*, joined fully by the chief justice and Justice Thomas, that argued for restoring constitutional limits on how much lawmaking power Congress can delegate.

Closer to home, it was another winning year for Cato at the Court. We filed 16 amicus briefs in cases on the merits, and our overall record was 12-4. That’s better than the Ninth Circuit, which once again was the biggest loser at the Court, being reversed or vacated 12 times and upheld only twice. Of course, the Supreme Court usually reverses or vacates, and this term it did so at the same rate as last term, 74 percent of the time.

Turning to the *Review* itself, while the term was not as epic as some in the last decade—during my first few years at Cato, I got tired of writing “term of the century”—there were plenty of important and intriguing cases. As always, the volume begins with the previous year’s B. Kenneth Simon Lecture in Constitutional Thought, which was delivered by famous columnist George F. Will. While it might seem strange to have an opinion journalist deliver a lecture in constitutional thought, Mr. Will has always been an astute observer of the Court and an insightful commentator on the Constitution. In his lecture, tellingly titled “The Insufficiently Dangerous Branch,”

<sup>2</sup> See the article on the case by me and James Knight in last *Cato Supreme Court Review*. Trevor Burrus and James Knight, *Katz Nipped and Katz Cradled: Carpenter and the Evolving Fourth Amendment*, 2017–2018 *Cato Sup. Ct. Rev.* 79 (2018).

Will confesses that he almost became a lawyer. When he was choosing between attending a prestigious law school or Princeton's Ph.D. program in political philosophy, he "chose to go to Princeton because it is midway between two cities with National League baseball teams." He takes up Alexander Bickel's question of the Supreme Court's "counter-majoritarian difficulty," or the problems posed by a non-elected Court overturning popularly enacted legislation. So be it, says Will. "Does judicial engagement make the judicial branch dangerous to the current scope of what is called, with much imprecision, majority rule? The one-word answer is: Yes. A three-word answer is: Not nearly enough."

Next, Professor Gary Lawson of Boston University School of Law (and a member of the *Review's* Board of Advisors) discusses what was, in my view, one of the true blockbusters this term, even though it was one of the cases that Cato lost. That *Gundy v. United States* was even at the Court was a surprise. The petition was filed *in forma pauperis* (meaning fees were waived) by a public defender who raised four questions to the Court. The fourth one was a real long shot and so she spent less than two pages of the petition on it: whether parts of the Sex Offender Registration and Notification Act violated the nondelegation doctrine. The nondelegation doctrine is the simple idea that Congress can't delegate to other entities its own lawmaking duties. Nearly everyone agrees this is true in theory. If Congress decided to delegate its powers to one guy, Bob, and then go back to their districts, the resulting Bobocracy would be unconstitutional. While that much is obvious, no one knows where to draw the line. Consequently, it's been more than 80 years since the Court has ruled unconstitutional any delegation of congressional power. It was thus a bit shocking when the Court took up the nondelegation question, the only part of the petition it granted. Professor Lawson—who was cited prominently in Justice Gorsuch's dissent—explains how the Court got tantalizingly close to reviving the nondelegation doctrine. Because Justice Kavanaugh had not yet been seated, the vote was 4-1-3, with Justice Alito providing essentially a courtesy vote for the majority. Still, Lawson writes, "*Gundy* is the first time since 1935 that more than two justices in a case have expressed interest in reviving some substantive principle against subdelegation of legislative authority" and, with Kavanaugh now on the bench, "it is very hard to read *Gundy* and not count to five under your breath."

Paul Larkin of the Heritage Foundation discusses baseball, deference, and administrative law in his article on one of the term's cases that fizzled, *Kisor v. Wilkie*. Like Professor Lawson, Larkin and our "Looking Ahead" author, Elizabeth Slattery, were coauthors of an article that was prominently cited by Justice Gorsuch in his concurrence. For a couple of decades, conservative and libertarian legal scholars, like Larkin and Slattery, have had their eyes on *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.*, two cases that help empower the administrative state. *Auer* and *Seminole Rock* are a form of intra-agency deference—deferring to the agency's interpretation of its own regulations—and thus are different than *Chevron* deference, which is judicial deference to an agency's reasonable interpretation of a congressional statute. Larkin examines whether Justice Kagan's majority opinion in *Kisor*, which added more limitations to *Auer* deference instead of overruling the case, simply turned *Auer* into a mutant version of *Chevron*. The effects of the decision are an open question. Perhaps "*Kisor* set administrative law on a more sensible course" or perhaps "it merely gave the lower courts just enough rope to enable the Supreme Court to hang that decision—along with its partner in crime, *Chevron*."

Stanford law professor and former Tenth Circuit judge Michael McConnell covers the Bladensburg cross case, *American Legion v. American Humanist Association*, which was another challenge to a religious symbol on public land. The Court has heard many such challenges—to nativity scenes, menorahs, crosses, etc.—and the decisions have resulted in a patchwork of strange and sometimes contradictory rulings. This is due partially to the inadequacies of the *Lemon* test—named after the 1971 case *Lemon v. Kurtzman*, but the consensus is that it could also have been named after a bad used car—that, theoretically at least, is supposed to be one of the Court's main tools for examining Establishment Clause questions. I say theoretically, because the Court seems to go out of its way to avoid using it, yet it hasn't overruled it either. Many people thought it might do so in *American Legion*, but instead the Court seemed to put *Lemon* on life support. Professor McConnell argues that, in fact, *Lemon* might be squeezed dry: "I cannot imagine a lower court thinking, after this, that the *Lemon* test is good law." Like Lawson, Larkin, and Slattery, McConnell was prominently cited in both Justice Alito's majority opinion and in Justice Gorsuch's dissent, completing our quartet of Supreme Court-cited contributors to this volume.

We invited a Tennessean to comment on the challenge to Tennessee's durational residency requirement for retail liquor licenses. Braden Boucek of the Beacon Center covers *Tennessee Wine and Spirits Retailers Association v. Thomas*, which explored the fascinating interplay between the Commerce Clause and Section 2 of the Twenty-first Amendment. In repealing Prohibition, the Twenty-first Amendment also sought to give states more authority over alcohol than other items of commerce. Section 2 says, "The transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."<sup>3</sup> Since the amendment was passed, there's been much wrangling over the scope of powers it grants to the states. Can states have different drinking ages for men and women? Nope.<sup>4</sup> Can a municipal sheriff, without due process, post someone's picture in every retail liquor store forbidding sales to her for a year? Nope.<sup>5</sup> *Tennessee Wine* was the latest to wrestle with these questions, and the Court ruled that the state couldn't require two years residency before getting a liquor license. In so doing, the case "refines the standard for evaluating the limits on the government's police powers and permissible scope of judicial scrutiny," which is "a pretty interesting result for a little case about good ol' Tennessee spirits."

Property law expert Ilya Somin of the Antonin Scalia Law School at George Mason University (and also a member of our Board of Advisors) covers *Knick v. Township of Scott*, a case that overruled a 1985 case that had dogged takings plaintiffs for decades. That case, *Williamson County*, imposed a type of exhaustion requirement on plaintiffs seeking compensation for property taken through eminent domain. Plaintiffs had to get a "final decision" from a state court before filing a takings claim in federal court. Combined with

<sup>3</sup> In fact, transporting alcohol into a state "in violation of the laws thereof" is one of the two ways an individual person can violate the Constitution. The other? Enslave someone.

<sup>4</sup> *Craig v. Boren*, 429 U.S. 190 (1976). My parents grew up in Oklahoma and my mom once had to buy my dad beer.

<sup>5</sup> *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) ("The chief of police of Hartford, without notice or hearing to appellee, caused to be posted a notice in all retail liquor outlets in Hartford that sales or gifts of liquors to appellee were forbidden for one year."). A personal favorite of mine.



another decision in *San Remo Hotel*, which held that a final decision in a takings case from a state court precludes relitigation of the same issue in federal court, many plaintiffs were caught in what Somin calls a “catch-22”: go to state court before federal court, but going first to state court kicks you out of federal court. Thankfully, the decision in *Knick* “should go down in history as a case that eliminated an egregious double standard that barred numerous takings cases from federal court in situations where other constitutional rights claims would not have been.”

In *Gamble v. United States*, the Court directly addressed whether the dual sovereignty exception to the Double Jeopardy Clause should be overruled. That exception allows either the federal government or a state government to prosecute someone for the same offense after a state or federal prosecution. To the surprise of some, the Court upheld the exception by a 7-2 vote, reasoning that “offenses” are defined by laws, which are in turn defined by sovereigns. “So where there are two sovereigns,” therefore, “there are two laws,” in the words of Justice Alito. Covering the case is Professor Anthony Colangelo of the Southern Methodist University Dedman School of Law, who contributed a fascinating article exploring the meaning of jurisdiction for the purposes of prosecution. If you’re a civil procedure or international law junkie, this article is for you. Professor Colangelo got me thinking about the meaning of sovereignty and when a sovereign is permitted to “grab” someone, so to speak, and prosecute them. While the Court’s decision in *Gamble* was unfortunate for many, the Double Jeopardy Clause is still, in Colangelo’s words, “an analytically gnarly beast” that seems like a “fairly straightforward prohibition on multiple prosecutions for the same crime” but “turns out to be a bramble bush of doctrinal twists and snarls.”

Next, Brianne Gorod and Brian Frazelle, who work for our sometime-allies at the Constitutional Accountability Center, tackle *Timbs v. Indiana*. *Timbs* dealt with one of the last remaining questions about which provisions of the Bill of Rights are incorporated against the states. Over the past 100 years or so, the Court has incorporated most of the provisions of the Bill of Rights against the states in a piecemeal fashion. The last major incorporation case, *McDonald v. City of Chicago*, incorporated the Second Amendment against the states. In *Timbs*, the Court was asked to decide whether the Excessive Fines Clause of the Eighth Amendment is incorporated.

Tyson Timbs was arrested for drug trafficking, but the state of Indiana also tried to take his Land Rover through civil forfeiture. The maximum fine for his offense was \$10,000, so taking his \$42,000 SUV seemed like an excessive fine. But the claim couldn't be brought in federal court because the Excessive Fines Clause didn't yet apply to the states. Unanimously, the Supreme Court fixed that. Gorod and Frazelle examine the history of the clause and the importance of the Fourteenth Amendment, which was designed to incorporate the entire Bill of Rights against the states. "Upon ratification of the Fourteenth Amendment in 1868, it should have been clear—indeed, it *was* clear—that the Constitution no longer permitted states to impose excessive fines on their citizens," they write, "yet it took the Supreme Court more than a century and a half to definitively settle this proposition."

Finally, Bruce Kobayashi, director of the Bureau of Economics at the Federal Trade Commission, and Joshua Wright, professor of law at Antonin Scalia Law School at George Mason University, take on *Apple Inc. v. Pepper*. This was a massive antitrust suit against the tech giant, wherein iPhone users allege that Apple is violating federal antitrust law by requiring users to purchase apps through the App Store. The Court, in a somewhat surprising opinion by Justice Kavanaugh, joined by the four "liberal" justices, decided that app purchasers were "direct purchasers" and therefore could sue Apple for antitrust violations. Kobayashi and Wright examine the implications of that decision going forward. Will the plaintiffs succeed against Apple? That depends on whether they can demonstrate the economics of passing on costs to consumers when app developers, rather than Apple, set the price of their apps. Through graphs and fairly complex economics, the authors argue that, on remand, "the court considering pass-on damages will find that the plaintiffs have not suffered competitive harm arising from the static effects of Apple's App Store commission level."

The volume concludes with a look ahead to the upcoming October Term 2019 by Elizabeth Slattery of the Heritage Foundation. As of this writing, the Court has granted review in 42 cases, and will likely add another 20-odd cases to the docket through the fall and winter. On deck, we have the return of the Second Amendment to the Court for the first time in nine years (*New York State Rifle & Pistol Association Inc. v. City of New York*), although the city of New York

is feverishly trying to moot the case. Also coming up is the return of Deferred Action for Childhood Arrivals (DACA), which last visited the Court in 2016 after Justice Scalia's untimely death, resulting in a 4-4 tie. In *Espinoza v. Montana Department of Revenue*, brought by our friends at the Institute for Justice, the Court will determine whether Montana's "Blaine Amendment"—a provision of its constitution that prohibits state revenue from going to religious organizations or causes—unconstitutionally discriminates against religion when it is used to invalidate a religiously neutral student-aid program. Many states have similar provisions in their constitutions, and they are often construed to restrict or even prohibit school-choice programs. Other cases in the coming term: whether the Sixth Amendment right to a trial by jury requires a unanimous verdict (*Ramos v. Louisiana*), whether the Eighth and Fourteenth Amendment permit a state to abolish the insanity defense (*Kahler v. Kansas*), and whether the members of the Financial Oversight and Management Board for Puerto Rico are "Officers of the United States" within the meaning of the Appointments Clause of the Constitution (*United States v. Aurelius Investment*).

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This is the first volume of the *Cato Supreme Court Review* I've edited, and I could not have done so without help. I'd like to thank Ilya Shapiro and Roger Pilon for trusting me with this task, and Roger particularly for hiring me out of the internship and saving me from a life in the doldrums of corporate law. Roger founded the Center for Constitutional Studies 30 years ago and conceived of this journal. His principled erudition helped create the ethos of the department, and I'm honored to help carry on the work that he started. I'd also like to thank the authors, without whom there would be nothing to edit or read. They are often given a difficult task—to write a ~10,000-word article in about five weeks—and still manage to produce readable and insightful commentary. When they hit their deadlines, it's even better.

Thanks also goes to my colleagues Bob Levy, Clark Neily, William Yeatman, Walter Olson, and (again) Ilya for helping to edit the articles, and legal associates Nathan Harvey, Dennis Garcia, James Knight, Michael T. Collins, and legal interns Christian Townsend and Kristen Toms for helping with the thankless but essential tasks of cite checking and proofreading. Special thanks goes to legal associate

Sam Spiegelman for stepping in and grabbing the administrative reins from Matt Larosiere. We both had to learn a little on the job, and Sam took to the task with gusto and an exceptional attention to detail.

I hope that this collection of essays will secure and advance the Madisonian first principles of our Constitution, giving renewed voice to the Framers' fervent wish that we have a government of laws and not of men. Our Constitution was written in secret but ratified by the People in one of the most extraordinary acts of popular governance ever undertaken. During that ratification process, ordinary people debated the pros and cons of the document, and, in so doing, helped turn the Constitution into a type of American DNA, belonging to no one but part of all of us. Those of the Founding generation shared many of our concerns today. They fretted over the possibility of rule by elites. They wished to ensure prosperity throughout the country. They worried that self-interested rulers would ignore the law and collect power in themselves. The Constitution is their best attempt at creating an energetic yet restrained government. It reflects and protects the natural rights of life, liberty, and property, and serves as a bulwark against government abuses. In this schismatic time, it's more important than ever to remember our proud roots in the Enlightenment tradition.

We hope that you enjoy this 18th volume of the *Cato Supreme Court Review*.